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**CAN THE PENALTIES FOR TREASON CO-EXIST
WITH THE CONCEPT OF PRIVATE PROPERTY?
A BOOK REVIEW OF CHARLES YORKE'S
"SOME CONSIDERATIONS ON THE LAW OF
FORFEITURE, FOR HIGH TREASON"**

By: Christopher Guzelian¹

Charles Yorke's book, *Some Considerations on the Law of Forfeiture, for High Treason*, is 274 years old. Nevertheless, it has modern relevance. President Trump,² prominent members of Congress (e.g., Senator Kamala Harris³), and Justice Brett Kavanaugh during his confirmation hearing (in an exchange with Senator Lindsey Graham⁴) have recently discussed law related to treason.

The last treason prosecuted in the United States was in 1952.⁵ Treason was prosecuted only in rare instances before that. Therefore, there is a sizeable deficit of modern United States legal understandings of treason, and Yorke provides a helpful catalyst for modern scholars to discuss the unintuitive relation between the concept of private property and the laws of treason.

Yorke spoke to appropriate property penalties for English traitors during the Jacobite Revolution of 1745. He denounced the Persian and Macedonian cultures that exacted the death penalty on the traitor's family and relations. But Yorke used examples from Athenian, Roman, Jewish, and feudal sources to show that personal forfeiture of assets (in addition to the possible use of the death penalty) was an appropriate consequence of treason. More strikingly, Yorke *did* support Corruption of Blood (i.e., denial of a traitor's right to pass inheritance to heirs or to his corporation⁶), although others in 1700s Britain

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2. See Donald J. Trump (@realDonaldTrump), TWITTER, (Sept. 5, 2018, 3:15 PM), <https://twitter.com/realdonaldtrump/status/1037464177269514240>.

3. *Kamala Harris Says She Would Not Execute Someone for Committing Treason Against the United States*, CNSNEWS.COM (March 15, 2019, 3:06 PM), <https://www.cnsnews.com/news/article/cnsnewscom-staff/kamala-harris-says-she-would-not-execute-someone-committing-treason> [<https://perma.cc/2WRM-MHEW>].

4. *Sen. Graham asks about Military Tribunals*, C-SPAN, (Sept. 5 2018), <https://www.c-span.org/video/?c4747307/sen-graham-asks-military-tribunals> [<https://perma.cc/UAP3-Q349>] (exchange with Justice Kavanaugh regarding law of armed conflict and military tribunals).

5. *Kawakita v. United States*, 343 U.S. 717 (1952).

6. CHARLES YORKE, *SOME CONSIDERATIONS ON THE LAW OF FORFEITURE FOR HIGH TREASON* (1748). Yorke believed that penalties for treason in *corporate* environments should rightly extend beyond the wrongdoer to the entire corporation. Yorke wrote: "In the case of a corporation; the sense of the majority, or of a chosen number, ordinarily determines the body. On account of faults committed in their cor-

had advocated for the abandonment of this principle.⁷ Yorke reasoned that the traitor had forfeited the “Protection of Society” by his act, and thus the right to pass property to his heirs (p.9).

There is a spectrum of state property “seizures.” They range from the more innocuous (takings, taxes) to the more invasive (civil/criminal forfeiture) to (in Yorke’s view) absolutist (treason).⁸ There are significant implications for the concept of private property and estate law that follow from a traitor’s asset forfeiture (as Yorke puts it). To wit, logical reasoning yields the following two possibilities (marked A and B below):

(A) If it is legitimate for the State to reposess private property ranging in scope from takings to treason (basically covering the whole scope of man’s actions—from mere existence (taxes like Obamacare) to committing the ultimate sin against the State (treason)), it means there really is no such thing as private property completely off limits to the State’s acquisition. Instead, all property is communal and an “owner” is really more a State-permitted steward of property who can have his stewardship taken away by the State if (1) the State needs to take the property “back” (takings,⁹ taxes) or (2) the property owner abuses the State’s laws (in varying degrees based on the level of abuse committed—civil forfeiture,¹⁰ criminal forfeiture, treason).

porate capacity, their markets, gates fortifications, harbors, are liable to forfeiture; and yet many innocent members may suffer the effect of such forfeiture.” *Id.* at 8. The implications are significant. For instance, if a traitor used corporate mechanisms to transfer funds to enemies of State, or to use the corporation’s proprietary information technology to assist in spying on the State or the citizenry, could Yorke’s legal arguments condemn the corporation—even if most owners, shareholders, or employees of the corporation were unaware of the treason—to asset forfeiture, either partially or entirely, at the State’s sole discretion.

7. Yorke acknowledged *Calv. Lex. Jurid.*, which maintained the popular English jurisprudential sentiment of the time that: “[Corruption of Blood] is a preposterous fiction, which tends to the ruin of families by putting their estates, for the fault of one ancestor, into the Power of the Crown.” *Id.* at 35–36. Yorke responded, “let not then the materials of this noble fabric [of Corruption of Blood], designed by the Wisdom, and erected, at infinite hazard by the bravery of our ancestors, become the object of aversion and hatred, or be held in dishonor and contempt.” *Id.* at 38. Moreover, he observed, “the great lawyers of the [British] Kingdom, men wisely and conscientiously zealous for national rights, have expressed the highest veneration for the law of treason established in England and seem more concerned for the certainty of it than to lessen the severity.” *Id.* at 66.

8. While Yorke’s historical review is highly instructive, it is important to note that the law of treason in the United States stems solely from the U.S. Constitution. *See Kawakita*, 343 U.S. at 741 (“The source of the law of treason is the Constitution.”). There may therefore be limitations based on U.S. Constitutional law that reduce Yorke’s broad scope of historical penalties for treason.

9. *See Kelo v. City of New London*, 545 U.S. 469, 489–90 (2005) (recognizing private economic development to be a “public use” allowing for government takings).

10. *See Timbs v. Indiana*, 139 S.Ct. 682, 689–90 (2019) (citing *Austin v. United States*, 509 U.S. 602, that punitive civil forfeitures violate the Excessive Fines Clause of the Constitution).

(B) If instead there truly is such a thing as *absolutely* private property as most libertarians (and some conservatives) insist, then the State's legal controls over that private property—ranging from takings to taxes to forfeiture to treason—are unlawful and immoral exercises of power.¹¹ Under this view, penalties for treason should not reach any and all private properties. (Certainly not those properties previously given to heirs). If private property can be absolute, then Yorke's claim that the State has virtually unlimited powers over private property as revealed through the historical laws of treason means reconsidering the State; it does not have (and should not have) power over everything, and perhaps even anything. (Extreme libertarians say a powerless State is a good thing¹²).

As stated above, Yorke's inquiry into the history of treason law demonstrates that the State traditionally has unlimited power over private property of not just the traitor, but also the traitor's family and community.¹³ This leads to the above split in how one can view the relationship between the State and property: one can either (1) reject that the State has *any* legitimate power over private property, or (2) claim that the State has uncontestable power over *all* property, and references to "private property" are simply a mask for what all "private" property really is: a loan from the State based on good citizenship and the State's current needs.

Yorke's take on the laws of treason seems to suggest that there is no middle ground between these positions. Property is either all private or all public. The fact that there are people who believe each possibility is what leads to the unending conflicts about property and who should have it. More significantly, this statist/libertarian dichotomy suggests one cannot maintain *both* a concept of private property *and* the historically understood penalties for treason.

Furthermore, if, as Yorke believed, the State's power over property is limitless after conviction for treason, there is an incentive for private citizens to enter government service so as to acquire their own private property derived from the State's plunder (legal or illegal) of others' private property, and then (as government officials) to hold themselves exempt from prosecution for treason or other crimes.¹⁴ In

11. See, e.g., MURRAY ROTHBARD, *MAN, ECONOMY, AND STATE* 1056 (2d ed. 1993) ("[A] truly free market is totally incompatible with the existence of a State, an institution that presumes to 'defend' person and property by itself subsisting on [] unilateral coercion against private property.").

12. See generally.

13. Yorke acknowledged the possibility that the Crown may return, *at its sole discretion*, some or all of a traitor's estate to his heirs, YORKE, *supra* note 5, at 46, but that Corruption of Blood in most circumstances can only be removed by an Act of Parliament, *id.* at 60.

14. Yorke did observe that in English feudal law, Lords who abused their privilege over their vassals were stripped of power, title, and resources. He wrote, "If the Lord proved guilty of injustice or oppression, his seigniority was forfeited . . . and the Tenant

other words, under Yorke's views on treason and property, the rise of an unconstitutional, legally immune kleptocracy is likely. Some people refer to this phenomenon as the "Deep State."¹⁵

However, there is a happier third possibility that possibly eliminates the need to choose between abandoning age-old conceptions of either private property or laws of treason. Namely, private people and corporations, as well as government officials in their private capacities, should forgive perceived State abuses of their "private property" by not resisting the State, and State officials should voluntarily limit both the scope of government's reach over "private property" and the extent of penalties exacted for treason and other crimes as not to be abusive. But this happier approach requires private forgiveness and government restraint.

Indeed, the Founders in their wisdom seemed to recognize that there is such a thing as absolutely private property that government must respect. The Constitution prohibits post mortem Corruption of Blood.¹⁶ Therefore, the document expressly rejects Yorke's view that there should be an unlimited property penalty for treason. Rather, its rejection of post mortem Corruption of Blood implicitly advances the concept of absolutely private property over the power of the State. We should be mindful of the honor the Founders gave to the concept of absolutely private property – specifically that property bestowed via inheritance on a treasonist's heirs after death – enshrined in the Corruption of Blood clause during this conflicted time in which accusations of treason are now widely manifest.

Yorke's wide-canvassing book provides excellent grist for a modern society that once again is discussing the laws and penalties of treason.

was to transfer his fealty to the Lord next above him, or to the Prince, as the supreme guardian." *Id.* at 30.

15. See generally, MIKE LOFGREN, *THE DEEP STATE: THE FALL OF THE CONSTITUTION AND THE RISE OF A SHADOW GOVERNMENT* (2016).

16. See U.S. Constitution, Art. 3 Sec. 3, para. 2. ("The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attainted.")